UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

M. DIANE KOKEN, AS LIQUIDATOR ON BEHALF OF RELIANCE INS. CO. (IN LIQUIDATION),	)	
Plaintiff	)	
v.	)	Civil No. 02-83-B-C
AUBURN MANUFACTURING, INC., et al.,	)	
Defendants	)	

RECOMMENDED DECISION ON AUBURN MANUFACTURING AND INPRO'S MOTIONS FOR SUMMARY JUDGMENT (Docket Nos. 74 & 75), AND MEMORANDUM OF DECISION ON RELATED MOTIONS TO STRIKE (Docket Nos. 96, 108 & 112) AND TO FILE SURREPLY SUMMARY JUDGMENT PAPERS (Docket No. 123)

In 1998, Androscoggin Energy, LLC, undertook to build an electric and steam generating facility in Jay, Maine and hired Black & Veatch Construction, Inc., to serve as contractor on the project. During a torch cutting operation associated with the project, a fire broke out and the project was damaged. In the course of cleaning up debris from the fire, a fire blanket that was used in connection with the torch cutting operation was discarded by the employees of a subcontractor. Reliance Insurance Company, the builder's risk insurer for the project, paid out approximately 1.6 million dollars to Androscoggin Energy and Black & Veatch in insurance proceeds. M. Diane Koken, as Liquidator on behalf of Reliance Insurance Company ("the Liquidator"), pursues through subrogation a products liability suit against Auburn

Manufacturing, Inc., a manufacturer of fire blanket, and Inpro, Inc., a distributor.[1] (Docket Nos. 12, 18[2].)

Separate and apart from the Liquidator's claims, Black & Veatch has asserted a cross-claim against Auburn Manufacturing and Inpro, seeking to recover more than 7.4 million dollars for additional repair costs and liquidated damages it paid to Androscoggin Energy as a consequence of disruption in the project and another cross-claim for contribution or indemnification in connection with the Liquidator's suit. (Docket No. 15.)

Auburn Manufacturing and Inpro, the primary target of the Liquidator's claims, have asserted cross-claims for contribution and indemnity against Black & Veatch in connection with the Liquidator's suit. (Docket Nos. 32 & 45.) They have also asserted cross-claims for contribution and indemnity against Redco, Inc., and O'Connor Constructors, Inc., subcontractors on the project, in connection with both the Liquidator's suit and Black & Veatch's cross-claim. (Id.) Inpro, for good measure, has also asserted a cross-claim for contribution against Auburn. (Docket No. 45.)

Auburn Manufacturing and Inpro have moved for summary judgment against all of the claims against them. (Docket Nos. 74 & 75.) They contend that the available evidence cannot support a finding that Inpro supplied or that Auburn manufactured the fire blanket associated with the fire. I recommend that the Court deny the motions.

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[1] The Liquidator also pursues contract and tort claims against Black & Veatch and two subcontractors associated with the fire, Redco, Inc., and O'Connor Constructors, Inc., for compromising or destroying the products liability action by discarding the blanket. I have recommended that summary judgment be entered against these claims in a companion opinion filed January 8, 2004.

[2] The Liquidator resubmitted the Second Amended Complaint with an amended signature line. The Clerk captioned this filing as a Third Amended Complaint. The filings are identical but for the signature lines.

Facts[3]

This case arose from a fire that occurred during the construction of an electric and steam generating facility in Jay, Maine, known to the parties as the Androscoggin Energy project and referred to herein as "the project." Black & Veatch Construction, Inc., served as contractor for the project and Redco, Inc., and O'Connor Constructors, Inc., served as subcontractors for Black & Veatch. Reliance Insurance Company was the builder's risk insurer. On May 17, 1999, a fire broke out at the project when a Redco employee was torch-cutting a steel lifting lug above turbine number 3 (a generator). The fire was caused when pieces of slag, or molten steel, fell onto a fire blanket ("the subject blanket"), which was covering a plywood platform on top of turbine number 3. The fire did not directly cause damage to the generator. Rather, chemicals discharged from a fire extinguisher entered the turbine and caused damage to it, requiring repair to the turbine and delaying the project. Workmen discarded the subject blanket shortly after the fire. The subject blanket has never been recovered. The sole contest presented by the instant summary judgment motions concerns the sufficiency of the evidence that Auburn manufactured and Inpro distributed the subject blanket.

Perry Austin, the Redco millwright who was torch-cutting the lug, participated in two depositions in which he was presented with blanket "exemplars" and asked to identify which most looked like the subject blanket. In the first deposition, conducted July 3, 2003, Austin initially described the subject fire blanket as having been gray in color, but then changed his mind and indicated that the subject blanket was orange and resembled a blanket manufactured by "Tillman." (Docket No. 76, ¶¶ 16-17.) During this deposition, Austin was disparaging of his

[3] The factual statement recited herein is drawn from the parties' Local Rule 56 statements of material facts in accordance with the Local Rule. The factual statement construes the available evidence in the light most favorable to the non-movants and resolves all reasonable inferences in their favor. Thames Shipyard & Repair Co. v. United States, 350 F.3d 247, 276 (1st Cir. 2003).

own testimony: "I know I'm not any help, whatsoever. Yes, it looks like the [orange] one. I said the other [gray] one did, too." (Docket No. 76, ¶ 18.) Auburn's blanket material is tan in color. (Docket No. 95, Attached Ex. 7.) During his second deposition, conducted August 28, 2003, Austin was shown an exemplar of an Auburn fire blanket (so-called exhibit 25) and the following colloquy transpired:

> Q. Where have you seen a burn blanket like this before?
>
> A. This looks like the blanket.
>
> Q. That you were using on May 17th, 1999, the time of the fire?
>
> A. Yes, it does.

(Docket No. 95, ¶ 7 (Austin's August Depo. Trans. at 10).)[4] Subsequently, Austin was further questioned by other counsel, virtually all of whom presented him with additional blanket exemplars to compare to the Auburn exemplar. The first comparison exemplar (deposition exhibit 67) was purportedly a "Steiner blanket." Austin indicated that he still would choose the Auburn exemplar as more resembling the subject blanket. Austin was then presented with another exemplar (deposition exhibit 68), purportedly an "Ameteck blanket." Once again, Austin chose the Auburn exemplar, though he acknowledged that he would not choose it if he had to make his decision based solely on color. Austin was presented yet another exemplar (deposition exhibit 69), purportedly an "ERCO blanket."[5] This time, as between the Auburn

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[4] Only the Liquidator has supplied a complete copy of Austin's August 28, 2003, deposition transcript, which can be found attached as Exhibit 7 to the appendix associated with Docket No. 97, captioned "Appendix of Exhibits Accompanying the Plaintiff's Opposition to Auburn Manufacturing's Motion for Summary Judgment."

In a deposition errata sheet signed September 29, 2003, Austin revised these two responses to read, "This looks like a fire blanket," and "I don't know." Black & Veatch argues that the errata sheet revisions support an inference of purposeful evasion (Statement of Material Facts in Opp. to Auburn's Mot. Summ. J., Docket No. 95, ¶ 7), but the Court need not draw any such inference because the original testimony is admissible evidence in its own right.

[5] ERCO is an acronym for Eastern Refractories Company, Inc.

exemplar and the ERCO exemplar, Austin indicated that he was getting confused and no longer knew which exemplar was most like the blanket in use at the time of the fire. (Id. at 19-20.) Thereafter, upon further questioning, he indicated that, in terms of texture and weave, he "want[ed] to say this one," again indicating the Auburn exemplar. (Id. at 21-22.) But when asked one last time which exemplar "looks the most like the one you were using on the day of the fire," Austin indicated, "Any one of these three here," indicating exhibits 25, 68 and 69. (Id. at 27.) (See Docket No. 95, ¶ 7; Docket No. 98, Additional[6] ¶¶ 7-12.)

It is undisputed that three rolls of Auburn fire blanket were delivered to the project. (Docket No. 75, ¶ 25.) Two—perhaps three—of these rolls contained blanket material identical to exhibit 25 in all ways except that the material weighed approximately 25% more per square yard. (Docket No. 95, ¶ 24.) A jury might find that the third roll, which was delivered roughly one week prior to the fire, contained material identical to exhibit 25.[7] (Docket No. 95, ¶ 25.)

According to Paul Gagnon, Redco's general foreman for the project, there could have been as many as one hundred fire blankets on the site, but his testimony also permits the

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[6] It is helpful if a party responding to a summary judgment statement of material facts numbers any additional statements of material facts consecutively to the movant's statements, rather than recommencing at "1."

[7] Auburn has manufactured two strains of welding blanket material. Exemplars of both can be found in the record at exhibit 7 attached to Black & Veatch's opposing statement of material facts (Docket No. 95). The exhibit illustrates how similar the two strains of material appear. One strain of Auburn material is so-called "2400 series," which weighs 24 ounces per square yard. The other is 2025 series, which weighs 18 ounces per square yard. Other than the weight of the materials, there is no appreciable difference between the two materials. (Docket No. 95, ¶ 24.) The exemplar presented to Austin at his August 28 deposition was composed of 2025 series material. According to Inpro's general manager, William Johnson, Inpro did not distribute Auburn's 2025 series material prior to the fire, only series 2400. Auburn and Inpro seek to use this testimony to establish that the series 2025 exemplar shown to Austin during his deposition could not have served as an identification exemplar for the subject blanket because there could not have been series 2025 material at the project as of the time of the fire. (Docket No. 107, ¶ 25.) This is not a particularly productive argument because, based on the similarity in appearance between series 2025 and series 2400 material, a jury might reasonably conclude that if the subject blanket looked like series 2025 material, as Austin testified, then it also looked like series 2400 material.

Additional evidence in the record would permit the jury to infer that the third roll of Auburn fire blanket delivered to the project was actually composed of series 2025 material. (Docket No. 95, ¶ 25.) The parties dispute whether such an inference is a fair one in light of Johnson's testimony. (See Docket No. 107, ¶ 25; Docket No. 108 at 8.) In my view the inference is one that a jury would be free to draw.

inference that this many fire blankets could have been cut from the three rolls of Auburn blanket. (Docket No. 76, ¶ 63; Docket No. 95, ¶ 63.) Gagnon testified that the subject blanket could have been cut from a roll other than the one in the Redco millwrights' tool crib, but he also testified that it would be the usual thing for a Redco millwright to obtain fire blanket from the Redco millwrights' tool crib, which contained its own roll of blanket. (Docket No. 95, ¶ 64; Docket No. 98, ¶ 64.) According to Gagnon, Redco millwrights would tell purchasing (i.e., Jay Adams, introduced below) whenever they needed an additional roll of fire blanket. (Docket No. 95, ¶ 34.)

A jury might infer—but would not be required to do so—that a partial roll of ERCO blanket was also delivered to the project from O'Connor's warehouse sometime prior to the fire. (Docket No. 76, ¶¶ 35-37.) In support of this factual statement, Auburn cites a set of invoices for "2025/9383 glass cloth," all of which was shipped from ERCO to O'Connor at locations in Charlestown and Canton, Massachusetts during the relevant time period. (Docket No. 76, ¶¶ 35-36.) The individual who served as materials manager for Redco and O'Connor for the project, Jay Adams, testified that he twice "requested" fire blanket from O'Connor's Canton, Massachusetts warehouse for use at the project. Adams testified that blanket sent in response to his request would have come to the project prior to the fire and would have been tan in color. (Docket No. 76, ¶¶ 40-42.) However, Adams's testimony indicates that he only observed the arrival of one partial roll of tan blanket in January. (Docket No. 76, ¶¶ 42-43, Ex. Q at 48:3-23.) His testimony does not support a finding that a roll of fire blanket actually arrived from the Canton warehouse in the spring of 1999 or that any such blanket would have been tan in color. Although the jury might infer that a roll of tan fire blanket arrived in the spring because Adams says he requested one around that time, it is not appropriate for the Court to draw such inferences

in favor of the summary judgment movant. Moreover, it would not be incumbent on the jury to credit Adams's testimony concerning the alleged partial role of fire blanket allegedly delivered in January 1999. Auburn also points to one ERCO invoice reflecting a shipment of product directly from ERCO to the project. (Docket No. 76, ¶ 37.) However, the product identified in the invoice is "Durablanket." Durablanket consists of a one-inch thick blanket insulation that is not meant for horizontal capture of welding slag and sparks. Not only is Durablanket not fire blanket, but being one-inch thick, Durablanket bears little resemblance to the thin fire blanket exemplars presented to Austin during his deposition and the appropriate summary judgment inference is that Durablanket was not associated with the fire. (Docket No. 95, ¶ 35.)

Also relevant to the inquiry is a January 4, 2000, letter from O'Connor Manager Kenneth Snee to Attorney Anthony Zelle, counsel for Reliance. Snee wrote the letter in response to a request from Attorney Zelle for any available information concerning the subject blanket. In response to this request, Snee indicated that the blanket had been discarded, but that he was enclosing a copy of an Inpro invoice dated May 10, 1999, for fire blanket "[that] was purchased just prior to the incident." (Id., ¶ 12; Docket No. 98, ¶ 1.) Finally, Eugene Whalberg, Rule 30(b)(6) corporate designee for both Redco and O'Connor, testified that Redco and O'Connor purchased more fire blanket rolls for the project only as needed for the work and that, so far as either Redco or O'Connor knew, the three rolls of Auburn fire blanket purchased from Inpro were the only source for the fire blankets used on the project. (Docket No. 95, ¶ 12.)

Motions Related to the Summary Judgment Record

1. Black & Veatch's Motion to Strike Opinions of William M. Johnson (Docket No. 96)

Auburn and Inpro offer testimony from William M. Johnson, general manager of Inpro, to the effect that a project the size of the Androscoggin Energy Project would have required

approximately 93 rolls of fire blanket material and that the three rolls of Auburn blanket Inpro supplied to the project would not have been sufficient to service all of the hot work performed on the project by Redco and O'Connor. (Docket No. 76, ¶¶ 65-66.) Black & Veatch moves to strike this opinion testimony on various grounds, including Daubert grounds. (Docket No. 96.) In opposition to the motion, Auburn and Inpro describe Johnson as a fact witness, not an expert witness, and argue that his lay opinions are permissible inferences drawn from admissible fact testimony. (Docket No. 110.) I agree with Auburn and Inpro that Johnson's fact testimony should not be stricken. On the other hand, when addressing a summary judgment motion the Court draws inferences in favor of the non-movant. In effect, Auburn and Inpro are asking the Court to draw inferences against the non-movants in order to credit Johnson's testimony. Ultimately, this testimony should neither be stricken, nor credited. A jury would be free to disregard Johnson's testimony at trial for several reasons, including (1) Johnson's acknowledgement that he has no experience in welding, (2) his mistaken assumption that Redco employees would not use any given fire blanket repetitively, which is belied by Austin's testimony, (3) the fact that much hot work is done without using fire blanket, (4) the contradictory testimony by Jay Adams, Redco and O'Connor's purchasing agent, that the entire project would likely only require six to eight rolls (Docket No. 95, ¶¶ 65-66; Docket No. 98, ¶ 65), and the fact that a jury simply need not infer, as Johnson does, that the subject project has anything in common with the entirely unrelated projects that form the basis of Johnson's inferential opinion. The motion to strike Johnson's affidavit testimony is **DENIED**.

2. Auburn's Motion to Strike Non-Rule 56 Evidence Submitted by Black & Veatch (Docket No. 108)[8]

In opposition to Auburn and Inpro's motions for summary judgment, Black & Veatch has presented a series of additional statements of material fact (Docket No. 95, ¶¶ 71-80) that essentially ask the Court to draw an inference that Redco and O'Connor witnesses lied under oath during their depositions in an effort to prevent Black & Veatch from identifying the subject blanket as an Auburn blanket so as to protect their employers from possible liability on Auburn and Inpro's cross-claims for contribution. The requested inference is premised on alleged communications involving Black & Veatch counsel, "Redco/O'Connor" counsel and certain O'Connor witnesses.[9] It is also premised on certain communications between counsel concerning the application of a confidential settlement agreement to the relationship between Black & Veatch, on the one hand, and Redco and O'Connor, on the other. The alleged communications are all described in affidavits submitted by Black & Veatch's counsel. Although Rule 56 certainly imposes an obligation on the Court to draw inferences in favor of Black & Veatch, a non-movant, the requested inferences are exceedingly grasping in nature. Asking the Court to infer perjury on the part of witnesses based on their silence concerning an issue and based on the wrangling of counsel is a curious way to generate a genuine issue of material fact on an issue concerning which one bears the ultimate burden of proof. My conclusion is that the challenged statements of fact add nothing material to the summary judgment record and I likely would have disregarded them even in the absence of a motion to strike. The only statement in this group that appears to present a material fact statement is

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[8] Inpro joins in this motion. (Docket No. 112)

[9] For example, Black & Veatch asks the Court to infer that witnesses from Redco and O'Connor as much as admitted that the subject blanket was an Auburn blanket because, during telephone interviews with Black & Veatch counsel, no one told Black & Veatch counsel that the blanket could have come from any other source. (Docket No. 95, ¶ 72.)

paragraph 71, in which Black & Veatch contends that Mr. Snee told its counsel, Attorney Lee Davis, that the subject blanket was supplied by Inpro. This conversation allegedly occurred during a meeting on April 30, 2001. (Docket No. 95, ¶ 71.) However, Attorney Davis's co-counsel and associate, Keith Pittman, failed to inquire about this alleged conversation during Snee's July 31, 2003, deposition, despite Snee's testimony during the deposition that the blanket could have come from another source. Needless to say, if there is an appropriate manner for Black & Veatch to impeach Snee's deposition testimony at trial, it would not involve putting Attorney Davis on the witness stand. Having failed to inquire about the alleged prior inconsistent statement during the deposition or to preserve the alleged statement in any more reliable way, I am not inclined to permit Black & Veatch's counsel to attribute statements to a witness, whether those statements are hearsay or not.

Auburn and Inpro also ask the Court to strike Black & Veatch's reference to certain O'Connor packing slips, which Black & Veatch referenced in response to Adams's statement that two rolls of non-Auburn, tan fire blanket arrived at the project in early 1999, before the fire. (See Docket No. 95, ¶ 42, Ex.31.) Black & Veatch failed to tie these exhibits to any authenticating testimony and they are stricken for purposes of this summary judgment motion.

Finally, Auburn and Inpro ask the Court to strike testimony by two fact witnesses, John Davisson, who served as Black & Veatch's project manager, and Alan Goodman, a private investigator retained by Black & Veatch's counsel in connection with this suit. Neither of these gentlemen provide expert opinion testimony in their summary judgment affidavits. The averments they offer are challenged on various grounds, including relevance and lack of materiality. I have not found it necessary to incorporate the affidavit testimony of these witnesses on behalf of Black & Veatch, having found sufficient evidence in the record to dispose

of the summary judgment motions without it, as discussed below. Suffice it to say that separately analyzing each of the averments contained in these two affidavits and the grounds given for striking them would not materially assist the Court in resolving the summary judgment contest.[10] The motion to strike is **GRANTED** with regard to Black & Veatch's statements of additional material facts 71 through 80 and to the packing lists referenced by Black & Veatch in its qualifying response to statement of material fact 42. The motion is **DENIED** in all other respects.

3. Black & Veatch's Motion for Leave to File Surreply and to Supplement the Record (Docket No. 123)

Black & Veatch moves for leave to submit a surreply memorandum and a surreply statement of material facts. Black & Veatch argues that it should have an opportunity to respond to Auburn's statement that Black & Veatch has a "cavalier" attitude toward its Rule 11

[10] Davisson's affidavit is found at Exhibit 1 to Black & Veatch's responsive statement of material facts. Goodman's affidavit is found at Exhibit 16 to the same. In its motion to strike, Auburn does not bother to identify the specific responsive statements of material fact that would be placed in jeopardy if the motion to strike were granted. For ease of reference, it is helpful if a party addresses a motion to strike at the statements of material fact that are being challenged, not simply at the underlying record source for the statement. I also note that Auburn and Inpro argue for striking evidence based on irrelevance, lack of materiality and improper testimony regarding issues of law. These three grounds are not especially good reasons to file a motion to strike, which serves to significantly delay the closure of the summary judgment record, increase the parties' costs, and clutter the Court's docket. If a statement of material fact is truly immaterial or irrelevant, then it can be admitted for purposes of summary judgment without risk. Additionally, the irrelevance, immateriality, or impropriety of a statement of fact can be explained in the associated summary judgment memorandum. Motions to strike are more appropriately used to address proffers that are both relevant and material, but are not of evidentiary quality for other reasons, such as an expert opinion that is based on unreliable science or a fact statement that is supported only by inadmissible hearsay, to give only two examples.

The affidavit of Alan Goodman is offered to impeach the affidavit testimony of William Johnson, Inpro's general manager, that Austin's deposition exemplar could not have been made of the same series of Auburn material as the subject blanket. I have already indicated, see footnote 7, supra, that a jury might reasonably infer that series 2400 material looks like the subject blanket, based on the resemblance between series 2025 and series 2400 material. The affidavit of John Davisson is used by Black & Veatch to address a variety of issues, including the likely source of dust on the subject blanket, how the various blanket exemplars used during the Austin depositions either do or do not resemble one another, how contractors normally keep records concerning the movement of consumable supplies and equipment, and the number of trades performing hot work on the project and the likely timeframe of that work. Although these issues are relevant in one way or another to the case, Black & Veatch's use of Davisson's affidavit testimony is not part of the factual basis on which I base my recommendation.

obligations.[11] Black & Veatch can rest assured that I have not based my recommendation in any way on this invective. Other than this concern, Black & Veatch's request is simply an effort to have the last word. The vast majority of its proposed surreply memorandum echoes prior submissions. As for the surreply statement of material facts, Black & Veatch is, in effect, asking that it be permitted to deny and qualify on Auburn's denials and qualifications of Black & Veatch's original denials and qualifications of Auburn's statements of fact. This is a far cry from the process envisioned by Local Rule 56. Additionally, the surreply statements Black & Veatch presents consist primarily of commentary on the evidence[12] and rely primarily on citation to Black & Veatch's opposition to Auburn's motion to strike rather than the record. Finally, the summary judgment record is already sufficiently muddled by Black & Veatch's decision to present the majority of its case in qualifying statements of material fact, rather than in its additional statement of material facts. One would think that counsel would prefer to set forth the factual basis for a claim in a statement of additional material facts. Among other things, such an approach enables counsel to present the facts of the case in the fashion that is most conducive to a favorable disposition. Such an approach also cleans up the papers significantly, because it permits the movant to address the claimant's additional statements directly, without having to admit, qualify and deny the claimant's admissions, qualifications and denials. The motion to file the surreply papers is **DENIED**.

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[11] In its original cross-claim, Black & Veatch alleged that the subject blanket was manufactured by another company, evidently because the Liquidator's complaint so alleged.

[12] For example, numerous conclusory statements are offered to the effect that various pieces of evidence are relevant, admissible and material.

Discussion

Summary judgment is warranted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the summary judgment facts in the light most favorable to the nonmoving party and credit all favorable inferences that might reasonably be drawn from the facts without resort to speculation. Merchants Ins. Co. v. United States Fid. & Guar. Co., 143 F.3d 5, 7 (1st Cir. 1998). If such facts and inferences could support a favorable verdict for the nonmoving party, then there is a trial-worthy controversy and summary judgment must be denied. ATC Realty, LLC v. Town of Kingston, 303 F.3d 91, 94 (1st Cir. 2002).

In the context of a summary judgment motion premised on the issue of product identification, the nonmoving party may identity the product by means of circumstantial evidence, but that evidence must support the inference that the movant's product was probably—rather than possibly or as likely as not—the product that caused the harm. See Tragarz v. Keene Corp., 980 F.2d 411, 418 (7th Cir. 1992) (concerning identity of source product in asbestos exposure case); Healey v. Firestone Tire & Rubber Co., 663 N.E.2d 901, 903 (N.Y. 1996) (concerning identity of manufacturer of exploding tire rim); Riley v. S.C. Johnson & Son, Inc., 2003 WL 22956922, *2, 2003 U.S. Dist. LEXIS 22453, *6 (W.D.N.Y. March 18, 2003) (Feldman, U.S. Mag. J.); see also Ricci v. Alternative Energy, Inc., 211 F.3d 157, 162 (1st Cir. 2000) (recognizing that proof of proximate causation by circumstantial evidence requires an inference of probable causation, not merely possible causation).

Auburn and Inpro argue that the subject blanket has not been identified to a reasonable probability as an Auburn blanket supplied by Inpro. They contend that there is a mere possibility that the subject blanket was an Auburn blanket because only three rolls of Auburn blanket are known to have been present at the project site and additional, non-Auburn fire blankets were also present at the site. (Auburn's Mot. Summ. J., Docket No. 75, at 15-17.) The ultimate question is whether, if it credited all of the evidence favorable to the non-movants, drew all available reasonable inferences, and discredited all of the evidence favorable to the movant that it did not have to believe, see Reeves v. Sanderson Plumbing Prods, Inc., 530 U.S. 133, 150-51 (2000), a jury could conclude, without engaging in speculation, that the subject fire blanket was probably manufactured by Auburn and supplied by Inpro. In my view, a jury could make the necessary finding based on the following evidence and reasonable inferences:

(1) The three invoices reflecting delivery of Auburn-manufactured fire blanket by Inpro, the Inpro warehouse picking ticket related to the third roll of Auburn blanket, and the total absence of any documentary evidence indicating that blanket from another source was delivered to the project.

(2) Austin's testimony that the Auburn series 2025 exemplar looked like the subject blanket.

(3) The exhibits depicting the similar appearance of Auburn series 2025 material and series 2400 material, which could support a conclusion that Austin's testimony concerning the Auburn exemplar is probative of the identity of the subject blanket, regardless of whether he was shown 2025 material instead of 2400 material.

(4) The absence of any evidence that Steiner or Ameteck blankets were present at the project.

(5) The absence of any documentary evidence that ERCO blanket was present at the project.

(6) The absence of any testimony based on personal knowledge that a roll of tan fire blanket was actually delivered to the project from O'Connor's Canton warehouse in the spring of 1999.

(7) The movants' attempt to pass off a delivery of ERCO Durablanket as a delivery of fire blanket.

(8) Inpro's delivery to O'Connor at the project of the third roll of Auburn fire blanket one week prior to the fire.

(9) Gagnon and Wahlberg's testimony that O'Connor purchased more fire blanket rolls for the project as needed, which could support an inference that Redco and O'Connor's blanket requirements for the May work on turbine 3 were satisfied by the May order of Auburn blanket.

(10) Testimony that Redco millwrights would normally use fire blanket obtained from their own tool crib and would request additional fire blanket through the purchasing agent.

(11) O'Connor and Redco's use of the same purchasing agent.

(12) Snee's January 4, 2000, letter to Anthony Zelle, which could support an inference that O'Connor considered Inpro's third delivery of Auburn blanket to be the most likely source of the subject blanket, because it is the only answer offered in response to a request for the identity of the manufacturer of the subject blanket and because Snee's indication that the May 10, 1999, invoice reflected a purchase "just prior to the incident" further supports an inference that the temporal proximity of the May 10 delivery to the May 17 incident is probative of the probable source of the subject blanket.

(13) Wahlberg's isolated testimony that the three rolls of Auburn blanket were the only known source for fire blanket used on the project, regardless of any contrary testimony he offered.

Conclusion

For the reasons stated herein, I **DENY** Black & Veatch's motion to strike (Docket No. 96), **DENY** its motion for leave to file surreply summary judgment papers (Docket No. 123), and **GRANT**, **IN PART**, Auburn's and Inpro's motion to strike (Docket Nos. 108 and 112). I further **RECOMMEND** that the Court **DENY** Auburn and Inpro's Motions for Summary Judgment (Docket Nos. 74 & 75).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated January 9, 2004

U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 1:02-cv-00083-GC
Internal Use Only

KOKEN v. AUBURN MANUFACTURING, et al
Assigned to: JUDGE GENE CARTER
Referred to:
Demand: $0
Lead Docket: None

Date Filed: 05/16/02
Jury Demand: Defendant
Nature of Suit: 190 Contract: Other
Jurisdiction: Diversity

Related Cases: None
Case in other court: None
Cause: 28:1332 Diversity-Breach of Contract

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dba
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ThirdParty Plaintiff

BLACK & VEATCH CONSTRUCTION, INC represented by **CHRISTIAN T. CHANDLER**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

ThirdParty Defendant

Cross Claimant

BLACK & VEATCH CONSTRUCTION, INC represented by **CHRISTIAN T. CHANDLER**
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V.

Cross Defendant

Cross Claimant

BLACK & VEATCH CONSTRUCTION, INC

represented by **CHRISTIAN T. CHANDLER**
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ATTORNEY TO BE NOTICED

PATRICIA A. HAFENER
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V.

Cross Defendant
----

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REDCO/O'CONNOR

Defendant

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PATRICIA A. HAFENER
(See above for address)
ATTORNEY TO BE NOTICED

V.

Cross Defendant

AUBURN MANUFACTURING INC

INPRO INC

Cross Claimant

AUBURN MANUFACTURING INC

V.

Cross Defendant

BLACK & VEATCH CONSTRUCTION, INC

INPRO INC

O'CONNOR CONSTRUCTORS INC

REDCO INC

Cross Claimant

O'CONNOR CONSTRUCTORS INC

V.

Cross Defendant

AUBURN MANUFACTURING INC

Cross Claimant

REDCO INC

V.

Cross Defendant

AUBURN MANUFACTURING INC

Cross Claimant

REDCO INC

V.

Cross Defendant

INPRO INC

Cross Claimant

INPRO INC

V.

Cross Defendant

AUBURN MANUFACTURING INC

BLACK & VEATCH CONSTRUCTION, INC

O'CONNOR CONSTRUCTORS INC

REDCO INC

REDCO/O'CONNOR INC

Cross Claimant

INPRO INC

V.

Cross Defendant

AUBURN MANUFACTURING INC

BLACK & VEATCH CONSTRUCTION, INC

O'CONNOR CONSTRUCTORS INC

REDCO INC

REDCO/O'CONNOR INC

Cross Claimant

O'CONNOR CONSTRUCTORS INC

V.

Cross Defendant

INPRO INC